Case No. 083739

In the
MISSOURI SUPREME COURT

STATE EX REL. AMERICAN ECONOMY INSURANCE COMPANY,

Relator,

v.

THE HONORABLE WILLIAM C. CRAWFORD, Circuit Judge, Jasper County Circuit Court,

Respondent.

ORIGINAL REMEDIAL WRIT FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI

THE HONORABLE WILLIAM C. CRAWFORD, JUDGE
Circuit Court No. CV199-640CC

RESPONDENT'S BRIEF

Oral Argument Requested

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

JURISDICTIONAL STATEMENT

Relator has invoked the jurisdiction of this Court pursuant to Article V, § 4, of the Missouri Constitution.

Relator seeks to make permanent a preliminary writ of prohibition granted by this Court against the Honorable William C. Crawford. The underlying action now pending in the Circuit Court of Jasper County, Missouri is a medical malpractice case that arises after an automobile accident and also involves claims against Relator for benefits under an under-insured motorist coverage.

This case involves an original remedial writ, and therefore, this Court has jurisdiction of this case under the Missouri Constitution Article V, § 4.

This writ involves a discovery order entered by Respondent, the Honorable William C. Crawford. (Respondent's Petition for Writ, Ex. B. Relator's Petition for Writ, hereinafter "RPW", RPW is not attached as it is already part of this Court's file. Respondent cites to Relator's Exhibits so as not to duplicate.)

The Relator previously applied to the Southern District of the Court of Appeals, but the Court of Appeals denied the request for an original remedial writ, by order dated May 14, 2001. (RPW, Ex. L)

This Court entered its preliminary order in prohibition on August 21, 2001. Respondent made written return on or before September 20, 2001, as ordered by this Court.

STATEMENT OF FACTS

Respondent objects to Relator's inclusion of a Preliminary Statement in Relator's Opening Brief. Such a statement is not provided for or allowed by the Missouri Supreme Court Rules.

The facts set forth herein below are not disputed.

THE PARTIES

Respondent Honorable William C. Crawford is the duly appointed Circuit Judge sitting in Division 1 of the Circuit Court of Jasper County, Missouri at Joplin. (RPW).

Plaintiff Curtis Jackson, Sr., by and through his Guardian, Lilley Mosley, filed suit against Relator, American Economy Insurance Company and a number of Missouri health care providers on May 9, 2000. (RPW Ex. J). Plaintiff's Petition sets forth a cause of action for underinsured motorist insurance payments and medical malpractice. (RPW Ex. J). Plaintiff suffered serious injuries to his neck in an automobile collision on July 6, 1998 in Labette County, Kansas, for which he received medical care in Joplin, Missouri. (RPW Ex. J). Plaintiff contends that as a consequence of the auto accident and the subsequent negligent medical care he suffered catastrophic brain injuries. (RPW Ex. J).

Relator American Economy Insurance Company is the underinsured motorist insurer in connection with the July 1998 auto collision and is a party defendant in the underlying action. (RPW Ex. K).

Prior to the commencement of the pending Missouri action, Relator American Economy Insurance Company was a party defendant in the Kansas litigation before being dismissed without prejudice in the Kansas case. (RPW, Ex. C, D, I).

THE CONSULTING EXPERT

In the underlying Missouri case, Relator American Economy sought to depose plaintiff's consulting expert, an accident reconstructionist named Jim Loumiet, who had previously been retained

by Plaintiffs' counsel in the case that was dismissed in Kansas. (RPW, Ex. G).

Mr. Loumiet is a consulting expert for Plaintiff in the present Missouri litigation and, in case there was any doubt about Mr. Loumiet eventually testifying, he has been expressly withdrawn by Plaintiff as a possible testifying expert. (RPW, Ex. A) In the Missouri case, Mr. Loumiet's report has not been disclosed nor has Mr. Loumiet been authorized to speak with any of the Defendants. Mr. Loumiet has not at any time in the Missouri or the Kansas case given deposition testimony regarding the motor vehicle collision on July 6, 1998. (RPW, Ex. A).

THE DISCOVERY ISSUE

In compliance with an order from the District Court of Kansas, a report prepared by Mr. Loumiet was disclosed to the Relator American Economy during the Kansas litigation. Subsequent to that report being produced to Relator, but before Mr. Loumiet was deposed, American Economy and other defendants were dismissed and the Kansas case was closed. Mr. Loumiet's deposition was not taken in the Kansas case, and no trial occurred in the Kansas case. (RPW generally, and RPW, Exhibit I). After the Kansas case was dismissed, this present action in Missouri followed.

All of the following actions occurred in the underlying action filed in Jasper County, Missouri. In response to a Notice to take the Deposition of James Loumiet, Plaintiff filed a Motion to Quash and for Protective Order. (RPW, Ex. G and RPW, Ex. H). The Respondent trial court, the Honorable William C. Crawford, sustained Plaintiffs' motion to quash the deposition of Mr. Loumiet, relying in large part on the recently decided *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831 (Mo. 2000). (RPW, Ex. A, page 18 and RPW, Ex. B).

Relator filed a Petition for Writ with the Missouri Court of Appeals for the Southern District on

or about April 10, 2001, requesting that the Southern District require the Respondent to vacate its order sustaining Plaintiff's motion to quash the deposition of Mr. Loumiet. On May 14, 2001, the Southern District issued its Order denying Relator's application for a writ. (RPW, Ex. L).

Having been denied relief by the Court of Appeals for the Southern District, Relator American Economy now seeks for this Court to take a path contrary to that mapped out in the *Tracy* decision, which expressly provides for an expert to be withdrawn and his opinions or impressions protected as work product.

Relator has proffered only one point of error in its Opening Brief and that is the argument concerning waiver. (Relator's Opening Brief, page 19). Relator has abandoned any other errors alleged in the lower courts including any errors concerning Mr. Loumiet's possible knowledge as a fact witness, and therefore, Respondent only addresses the issue of waiver. (Relator's Opening Brief).

POINT RELIED ON

I. RESPONDENT'S ORDER SUSTAINING PLAINTIFF'S MOTION TO QUASH AND FOR A PROTECTIVE ORDER WAS NOT AN ABUSE OF DISCRETION AND SHOULD BE ENFORCED, BECAUSE MR. JAMES LOUMIET IS PLAINTIFF'S CONSULTING EXPERT AND PLAINTIFF HAS UNQUESTIONABLY NOT WAIVED ANY PROTECTIONS OF THE WORK-PRODUCT DOCTRINE IN THE MISSOURI CASE SO THAT MR. LOUMIET'S FINDINGS AND OPINIONS REMAIN PROTECTED BY THE WORK PRODUCT DOCTRINE, IN THAT PLAINTIFF HAS NOT DESIGNATED MR. LOUMIET AS A RETAINED EXPERT IN THIS MISSOURI CASE WHOSE DEPOSITION HAS BEEN TAKEN, HAS NOT OFFERED ANY DOCUMENT OR OPINIONS OF MR. LOUMIET IN THIS MISSOURI CASE, AND TO ELIMINATE ANY DOUBT, HAS SPECIFICALLY WITHDRAWN THE POSSIBILITY OF MR. LOUMIET BEING A RETAINED TESTIFYING EXPERT IN THIS MISSOURI CASE.

Brown v. Hamid, 856 S.W. 2d 51(Mo. banc. 1993)

State ex rel. Day v. Patterson, 773 S.W. 2d 224 (Mo. App. E.D. 1989)

State ex rel. Mitchell Humphrey & Co. v. Provaznik, 854 S.W.2d 810 (Mo.App.E.D.1993)

State ex rel. Richardson v. Randall, 660 S.W. 2d 699 (Mo. 1983)

State ex. Rel. Tracy v. Dandurand, 30 S.W. 3d 831 (Mo. 2000)

ARGUMENT

I. RESPONDENT'S ORDER SUSTAINING PLAINTIFF'S MOTION TO QUASH AND FOR A PROTECTIVE ORDER WAS NOT AN ABUSE OF DISCRETION AND SHOULD BE ENFORCED, BECAUSE MR. JAMES LOUMIET IS PLAINTIFF'S CONSULTING EXPERT AND PLAINTIFF HAS UNQUESTIONABLY NOT WAIVED ANY PROTECTIONS OF THE WORK-PRODUCT DOCTRINE IN THE MISSOURI CASE SO THAT MR. LOUMIET'S FINDINGS AND OPINIONS REMAIN PROTECTED BY THE WORK PRODUCT DOCTRINE, IN THAT PLAINTIFF HAS NOT DESIGNATED MR. LOUMIET AS A RETAINED EXPERT IN THIS MISSOURI CASE WHOSE DEPOSITION HAS BEEN TAKEN, HAS NOT OFFERED ANY DOCUMENT OR OPINIONS OF MR. LOUMIET IN THIS MISSOURI CASE, AND TO ELIMINATE ANY DOUBT, HAS SPECIFICALLY WITHDRAWN THE POSSIBILITY OF MR. LOUMIET BEING A RETAINED TESTIFYING EXPERT IN THIS MISSOURI CASE.

The issue presented to this Court, is whether the trial court abused its discretion in sustaining the Motion to Quash the deposition of Plaintiff's consulting expert.

STANDARD OF REVIEW

A writ of prohibition is appropriate where a respondent has acted in excess of his jurisdiction,

the action is necessary to prevent the usurpation of judicial power, or is necessary to prevent an absolute and irreparable harm to a party. *State ex rel. Dir. of Revenue v. Gaertner*, 32 S.W. 3d 564, 566 (Mo. banc 2000). A writ of prohibition is an extraordinary remedy that should only be granted where a clear right to it exists. *State ex rel. M.D. K. v. Dolan*, 968 S.W. 2d 740, 745 (Mo. App. E.D. 1998). Prohibition should be employed by the courts judiciously and with exceptional restraint. *Derfelt v. Yocom*, 692 S.W.2d 300, 301 (Mo. banc 1985). "A writ of prohibition does not issue as a matter of right." *Id*. The Court should issue this writ only "when the facts and circumstances of the particular case demonstrate unequivocally that there exists an extreme necessity for preventative action." *Id*.

In Relator's Opening Brief, Relator correctly identifies 'abuse of discretion' as the standard of review for this issue involving the quashing of a discovery deposition. (Relator's Opening Brief, pages 19-20, *State ex rel. Charter Bank Springfield, N.A. v. Donegan*, 658 S.W. 2d 919, 924 (Mo. App. S.D. 1983). Trial courts rule on discovery requests in the first instance, and appellate courts will prohibit the trial court from acting only in rare circumstances where the trial court abuses its discretion. *State ex rel. Norfolk & W. Ry. Co. v. Dowd*, 448 S.W.2d 1, 2-4 (Mo. banc 1969). Prohibition is the proper remedy when a trial court issues an order in discovery proceedings that is an abuse of discretion. *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927-28 (Mo. banc 1992).

> The trial court is allowed broad discretion in the control and management of discovery. It is only for an abuse of discretion amounting to an injustice that the appellate courts will interfere. 'A trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as

to shock the sense of justice and indicate a lack of careful consideration.'

State ex rel. Lichtor v. Clark, 845 S.W.2d 55, 59 (Mo.App. W.D.1992). (citations omitted); quoted with approval in, *State ex rel. Justice v. O'Malley*, 36 S.W.3d 9, 11 (Mo.App. W.D. 2000).

A. Respondent did not abuse his discretion when he followed existing case precedent, specifically two cases decided by this Court, and sustained Plaintiff's Motion to Quash the deposition of Plaintiff's consulting expert.

On February 7, 2001, a motions hearing was held in the Circuit Court of Jasper County, Missouri, with Respondent the Honorable William C. Crawford presiding. (RPW Ex. A). At the hearing, Plaintiff's Motion to Quash and for Protective Order was taken up. (RPW Ex. H). During the hearing, Judge Crawford took the time to read a case, *Brown v. Hamid*, hear oral argument by both Defense Counsel and Plaintiff's Counsel, reviewed the *Tracy v. Dandurand* decision, and specifically invited Defense counsel to

articulate when and where the waiver of the work product protections occurred (RPW, Ex A pages 8-11):

> BY THE COURT: All right. And in looking at this Brown v. Hamid, H-A-M-I-D, and in looking at the Dandurand case it looks like they are saying the same thing. . . .I think when an attorney says this person is not going to be an expert and we're going to retain him for consulting purposes only, I think both these cases say that you retain the work product immunity, if that happens. . . . (RPW, Ex. A page 9).

I guess you believe they've waived it somewhere, but I'm not sure where.

(RPW, Ex. A page 11).

BY MR. DeFOE [Defense Counsel]: . . . I believe a waiver has occurred. At least as to the materials –

BY THE COURT: Where did it occur now?

BY MR. DeFOE: Where did it occur?

BY THE COURT: Well, when and where, I guess?

BY MR. DeFOE: I'm not sure of the precise date, but it occurred in connection with the discovery in the Kansas case. That was prepared in and he was identified as a witness, a testifying witness in that case, that report was tendered.

(RPW, Ex. A page 11).

As noted in the above-quoted excerpts, Respondent specifically considered the case law presented to him and addressed the issue of waiver. The trial court concluded that no waiver had occurred which would permit the deposing of plaintiff's consulting expert. Respondent's decision to deny Relator formal discovery of Plaintiff's consulting expert is consistent with existing case law and can in no way be considered an abuse of discretion.

It is clear from the above-quoted excerpts that Relator believes that a waiver occurred at the time that Mr. Loumiet was identified as a retained expert and when Loumiet's report was provided to Relator in the Kansas case. This is also Relator's sole point relied on in this Writ action. (Relator's

Opening Brief, p 19).

In this case, filed in Missouri, Plaintiff has never designated Mr. Loumiet as a retained expert, Plaintiff has not offered any report, document or opinion of Mr. Loumiet in this case, and to eliminate any doubt Plaintiff has specifically withdrawn the possibility of Mr. Loumiet being a testifying witness and represented to the trial court, and each of the appellate courts, that Mr. Loumiet has and always will be a consulting expert in this case. (Respondent's Answer to Writ, "RAW", paragraph 24).

Although Defense counsel failed to include any reference to *Brown v. Hamid*, 856 S.W. 2d 51 (Mo. banc. 1993), in its Opposition to Plaintiff's Motion to Quash; Relator, at the Motions Hearing and since then has consistently relied upon *Hamid* for its contention that Plaintiff has waived the work product immunity.(See generally, RPW & RPW Ex. F).

Before ruling against Relator, Respondent addressed each of the possible means of waiver enumerated in *Hamid* during the Motions Hearing and made at least three determinations on the record:

1. Mr. Loumiet is a consulting expert in this Missouri case.
2. Mr. Loumiet has not been authorized by Plaintiff to talk to Defendant or its counsel.
3. No work product regarding Mr. Loumiet has been given to Defendant in this Missouri case. (RPW Ex. A, pages 10-11, 18-19).

In this case, the trial court carefully considered Relator's position, questioned Relator about it, and even stated for the record its implicit findings required for its ruling. (RPW Ex A, pages 10-11; 18-19). The trial court during the Motions Hearing specifically referred to the part of *Hamid* that was relied upon by Defense counsel.

[BY THE COURT:] This Hamid case and the very part you read says, 'A party waives any work product immunity for a consultant by giving the work product to the other side,' which hasn't happened here, I don't guess. 'Or by authorizing the consultant to talk to the other side,' which hasn't happened. 'If the consultant is also a witness, this immunity is waived by formal discovery.' Well, apparently the person is not a witness.

(RPW Ex A, page 18.)

BY THE COURT: All right. Well, I think that the Dandurand case, Tracy v. Dandurand provides the guidance the Court needs in this and I think this consulting expert or the person that plaintiff now says is the consulting expert and will not be called at trial retains the work product supplied, so I think I disagree with your interpretation of those cases. So I'm going to sustain the Motion to Quash.

(RPW Ex A, page 18).

B. Relator misconstrues *BROWN V. HAMID*, 856 S.W. 2d 51 (Mo. banc. 1993).

Relator cites *Brown v. Hamid* for the proposition that "A party waives any claim of work product privilege [immunity] by providing the information to the opponent." (Relator's brief, page 28). Relator overlooks a number of important factors that limit the holding in *Hamid* and fails to recognize the facts that so clearly distinguish these two cases.

Brown v. Hamid unquestionably involves a partial waiver of work product immunity due to a

disclosure of protected materials in the state of Missouri. *Id*. Nothing in *Hamid* at all addresses the effect (if any) of a prior disclosure in a separate case previously filed and dismissed in another jurisdiction.

What *Hamid* did address was the roles of the retained expert and the transformation from consulting expert to testifying expert and its attending effect on work product immunity. In *Hamid*, this Court distinguished between the scope of discovery of a trial witness expert and that of a consulting expert:

> "Rule 56.01(b) recognizes two roles that a retained expert can play in a case. First, an expert can be a "consultant," giving opinions to advise the legal team. Rule 56.01(b)(3). Second, an expert can be a trial witness. Rule 56.01(b)(4). Rule 56.01(b)(4)(a) requires a party to disclose, upon interrogatory, the names of its expert witnesses. Until such an interrogatory, retained experts are consultants; and their written opinions are work product. Under Rule 56.01(b)(3), work product enjoys a "qualified immunity" from discovery. *State ex rel. Missouri Highways & Transportation Commission v. Legere*, 706 S.W.2d 560, 566 (Mo.App.1986). This immunity is absolute with regard to the mental impressions, conclusions, or opinions of consultants. Rule 56.01(b)(3)." *Brown v. Hamid*, 856 S.W.2d 51, 54, (Mo. 1993)

In this case there is no suggestion in Relator's brief or in the record that Mr. Loumiet has ever been identified in an Answer to Interrogatory or in any other way as a testifying witness. Mr. Loumiet has always been a consulting expert - only. This Court has unequivocally stated that the impressions,

conclusions, or opinions of consultants are absolutely immune from discovery. The *Hamid* court makes clear that consultants' mental impressions, conclusions, or opinions – all of which comprise the subject matter that the Relator's deposition notice indicates Relator seeks to explore with Mr. Loumiet in the proposed deposition -- are absolutely immune from discovery. *Id*.

It is important to note that this Writ involves Respondent sustaining a Motion to Quash a Deposition. Since this writ action was begun Relator has attempted to back away from the expansive language in the Notice, but the record is clear that the Respondent quashed a specific notice of deposition whose very language bespoke the intention to invade any and all mental impressions of Plaintiff's consulting expert. (RPW, Ex G, A, and B).

> "In accordance with Missouri rule of Civil Procedure 57.03(b)(1), the witness shall bring with him and produce during his deposition the following documents and tangible things:
>
> 1. All information known to you to exist concerning an automobile accident of July 6, 1998 at the intersection of 25th Street and Thorton Street in Parsons, Labette County, Kansas and any investigation known by you to have been done concerning the intersection, signs, sight distance, and driver action."
>
> (RPW, Ex. G).

As this Court can clearly see, this language does not confine itself to the content of the report previously supplied in the Kansas case. Even assuming a waiver of the contents of that report had occurred in the Kansas case and assuming that waiver had any effect

on the work product immunity in the Missouri case, then *Hamid* clearly indicates that the waiver would be limited to the contents of the report. Even then, *Hamid* only authorizes ex parte contact – not formal discovery. *Hamid* only specifically allows informal discovery to the extent of the waiver. Again, assuming *arguendo*, that a waiver did occur, Relator seeks to over-rule *Hamid's* enunciation that partial disclosure equals a partial waiver. Instead, Relator would have this court declare that any waiver of any information opens the door to formal discovery of any and all work product known to that expert. This is clearly contrary to the explicit holding of *Hamid* and is repugnant to the well-established principle and precedents protecting the work product doctrine.

Furthermore, *Hamid* makes no mention of the availability of formal discovery process. Relator seeks to have a Writ issue for the trial court failing to extend the Supreme Court's decision. Relator's Petition for Writ urges this Court to find that Respondent abused his discretion when Respondent sustained the Motion to Quash a deposition that is not allowed by existing case law. Further, Respondent followed the reasoning and the holding of *Hamid*, and analyzed and reconciled the possible conflict between *Hamid* and *Tracy v. Dandurand*. Relator would have this Court find that Respondent, in following the guidance of the Supreme Court in *Tracy* and in declining to extend *Hamid's* holding to allow formal discovery based on a theory of a complete waiver of any work product immunity abused the trial court's discretion! How can the trial court decision be an abuse of discretion if it follows existing case law? This Court and the lower appellate courts have long been concerned with protecting the work product of opposing parties. Had Respondent followed Relator's urgings and allowed the

unrestrained exploration of Plaintiff's consulting witness' opinions and mental impressions in a deposition because of some imagined partial waiver in a foreign jurisdiction in a case that has been dismissed, then respondent actually would have committed an abuse of discretion.

C. *STATE EX REL. TRACY V. DANDURAND*, 30 S.W.3d 831 (Mo. 2000) holds that an expert witness retains work product immunity until that expert's deposition is taken.

In *State ex rel. Tracy v. Dandurand*, 30 S.W.3d 831 (Mo. 2000), the Missouri Supreme Court provided specific guidance regarding the issue of when the work product immunity is waived for retained experts. In *Tracy*, attorney client privileged documents had inadvertently been delivered to a retained expert and were disclosed as part of the normal expert document disclosure at the time of the expert's deposition. The issues

presented in that case included the extent to which the work product immunity protects from disclosure information provided to an expert during discovery.

This Court noted that "expert witnesses retained for litigation are unique. . . . The documents, materials, and other information provided to him are the sources of the facts that he knows." *Id*. at 834.

This Court went on to provide specific instruction of when privileged information held by an expert must be disclosed and how it can be protected from disclosure:

> The expert witness is wholly in the control of the party who retained him or her. If the party's attorney, in preparing the expert for deposition finds that privileged documents have been mistakenly provided to the expert, the attorney

> presumably has the option of withdrawing the expert's designation prior to the deposition. **The attorney can claim work-product protection as to that retained expert, since the expert will not be called at trial**. . . .
>
> (emphasis added) *Id.* at 834.

This Court went on to explain that once that expert gives testimony, the work product protection is no longer available.

> "Once the expert's testimony is taken, the deposition is available for use by any party, subject to Rule 57.07. The bell has been rung and cannot be unrung." *Id.* at 836.

The *Tracy* decision does not at all suggest that the defendant's mere possession of documents that may have been generated by an expert or provided to that expert in another matter somehow waives the privilege over the expert's opinions in this matter. It is the taking of the deposition that officially completes the process of an expert's metamorphosis from a consulting expert into a testifying expert. As clearly noted in *Tracy*, it is when the deposition takes place that the bell is rung and cannot be un-rung. At that point, the deposition is free for use by all at trial, even if the expert's opinions harm the case of the party that retained him. Up until that time, however, as this Court clearly states in *Tracy*, the expert can be withdrawn as a testifying expert and the work-product protection remains intact.

In this case, the Relator attempts to make a distinction of the bright-line rule in *Tracy* by suggesting that the Plaintiff somehow waived the work product privilege and has given up the right to

remove a consulting expert from the class of testifying experts. Relator reasons that this waiver occurred by the identification of Jim Loumiet as an expert and production of his report pursuant to a Kansas court order in an earlier case filed by the same Plaintiffs. (Relator's Opening Brief).

D. The mere identification of an expert witness does not eliminate the work product immunity for that expert.

A plain reading of *Hamid* irrefutably defeats any suggestion that the mere identification of an expert is sufficient to waive the privilege. For in *Hamid*, the expert witness had in fact been previously identified as a witness that would be testifying. This Court noted: "The identification of a retained expert as a witness begins the process of waiving this immunity. At the time of identification, a party need only disclose the general subject matter of the testimony." *Hamid* at 54. This Court clearly stated that identifying an expert only begins the waiver process and is not the end of the process.

It is the act of testifying that completes the transformation of the consulting expert into a testifying expert and completely waives the work product immunity. "If the expert is deposed under Rule 56.01(b)(4)(b), further information is disclosed, constituting a waiver of the 'work product immunity.'" This Court went on to state that the disclosure may only be accomplished by formal discovery. "While the disclosure may only be compelled by formal discovery, which is limited by Rule 56.01(b)(4), nothing in the Rules forbid a party from using informal discovery --including ex parte contacts--to discuss matters previously disclosed." *Id*.

Nothing in *Hamid* suggests that formal discovery can be obtained, nor does *Hamid* permit the ex parte contact to go beyond matters previously disclosed. Therefore the absolute most favorable interpretation of *Hamid* Respondent could have made for Relator is that Plaintiff could not prohibit

Defendant from having ex parte contacts with Mr. Loumiet to discuss matters previously disclosed, i.e. his report.

In addition to the explicit language of *Hamid*, Respondent also relied upon the reasoning in *Tracy v. Dandurand* in deciding that the mere disclosure of an expert does not waive the work product immunity. The reasoning in *Tracy* mandates that even a disclosed expert that had been provided protected materials could remain a consulting expert so long as the party withdrew the expert prior to the expert's deposition. In Tracy, the Court states that a withdrawal of the expert prior to the expert testifying served to keep the privilege intact. *Tracy* at 836. Therefore, under either or both *Tracy* and *Hamid*, Respondent could not allow full-scale formal discovery of Plaintiff's consulting expert, Mr. Loumiet, even if Mr. Loumiet had been identified in this Missouri action.

Unlike the facts of the *Hamid* and the *Tracy* case, in this case the disclosure of protected information and the disclosure of the expert's identity did not occur in the pending action in Missouri but in an earlier separate Kansas case. This earlier Kansas case arose from the auto wreck that occurred in Kansas but did not include the malpractice claims that are now pending in Jasper County in a consolidated action with the underinsured motorist claims against Relator. Although Relator would like to ignore that the Kansas case was a different case from the one pending now in Jasper County, Missouri; the reality remains that in this present action, Mr. Loumiet has been retained by Plaintiff as a consulting expert only. (RPW Ex. H, and Ex. A, page 6). He has not testified, nor has any document been provided by the Plaintiff in this Missouri case that would waive any part of the immunity that undoubtedly attaches to the consulting work product provided to and by Mr. Loumiet. Relator was specifically informed that Mr. Loumiet was an ongoing consulting expert retained by Plaintiff in this case,

and that he would not be serving as a testifying expert. (RPW Ex. H, and Ex. A, page 6). The *Hamid* court makes clear that consultants' mental impressions, conclusions, or opinions are absolutely immune from discovery. The *Tracy* court extends that absolute immunity beyond the answers to interrogatories and up to the moment the expert deposition commences, thereby officially turning that expert from a consultant to a testifying expert.

Consequently, under both the *Tracy* decision and the holding in *Brown v. Hamid*, Mr. Loumiet's mental impressions, opinions, conclusions and the facts upon which he relies to form them would not be discoverable.

Relator argues that once the identity of a consulting expert becomes known, that somehow serves to make the consulting expert available for deposition and other formal discovery. Contrary to the Relator's strained interpretation of this Court's opinion in the *State ex rel. Richardson v. Randall*, 660 S.W.2d 699, 701 (Mo. 1983), this Supreme Court did not suggest that knowing a consultant's identity inherently waived the work product immunity possessed by a party over that expert consultant's mental impressions, conclusions, or opinions, as both *Hamid* and the Missouri Supreme Court Rules make clear. Instead, the *Randall* court issued a writ prohibiting the disclosure of a criminal handwriting expert's identity because of concern of the manifest unfair prejudice that would cause the party that had retained the consulting expert. *Id.* Moreover, as discussed in detail herein, both *Hamid* and *Tracy* make crystal clear, a consultant's opinions and the information relied on to form those opinions are protected until that expert is transformed from a consultant to a testifying expert by that expert being deposed.

E. The mere possession of Mr. Loumiet's report does not waive the work product

immunity as to allow for formal discovery directed to Mr. Loumiet.

Hamid does not at all suggest that a consulting expert such as Mr. Loumiet can be deposed once a report he has provided in an earlier case is disclosed in that separate case to comply with a court's order. If Mr. Loumiet were submitted as a testifying expert in this case, and his report had been provided in this case then it could certainly be used against him or Plaintiff as could any other relevant document which could possibly impeach Mr. Loumiet. (Fortunately, Mr. Loumiet is not a testifying witness in this case, and the Court need not decide if Mr. Loumiet's report can be used in this underlying action, because the only issue before this Court is whether Respondent committed an abuse of discretion in quashing Mr. Loumiet's deposition.) Instead, Mr. Loumiet's report was not disclosed in this case, and even if it had been, *Hamid* quite clearly demonstrates, that when the subject expert is a consulting expert only, and some privileged information is disclosed, then the waiver of that immunity is limited to the matter disclosed. *Hamid* at 837. Whatever other information that expert has or has used in forming his or her mental impressions and conclusions remains absolutely immune from discovery.

The *Hamid* decision specifically holds that a party may have a *limited* waiver allowing for ex-parte contacts with a testifying expert on the subject matters expressly stated in interrogatory responses as being the scope of the expert's expected trial testimony. But, nothing in *Hamid* speaks to the complete waiver of the immunity or the right to formal discovery process in regards to a non-testifying expert witness. While *Hamid* does not address the issue, when the *Tracy* decision is reconciled with the *Hamid* decision, it is apparent that the mental impressions and conclusions of that expert (even in the limited waiver situation) would remain protected by the work product immunity if the party retaining the expert withdrew him as a testifying expert at any point up to the deposition taking place. (This Court

need not go so far as to confirm this interpretation, as Plaintiff at no time designated Mr. Loumiet as a testifying witness in this Missouri case.)

Since in *Tracy*, the expert disclosed as a testifying expert can be withdrawn and his opinions protected even after identification and disclosure of the general subject matter of his testimony, then certainly the work product immunity must continue to exist in this case, where Mr. Loumiet has not been identified as a testifying expert at all.

In the Notice to take Mr. Loumiet's deposition, Relator sought a complete waiver of any immunity or privilege with regard to information, mental impressions, conclusions or opinions of expert Loumiet. (RPW, Ex. G). None of the cases cited by the Relator

support that result – regardless of how the production of his report in the Kansas case is viewed.

To the contrary, the *Hamid* case as noted above, and the *Mitchell Humphrey & Co. v. Provaznik* case at best provide for only very specific and limited waivers over certain information held by either testifying experts (in *Hamid*) or over reports produced in discovery in the same case (in *State ex rel. Mitchell Humphrey & Co. v. Provaznik*) 854 S.W.2d 810, 812-813 (Mo. App. E.D. 1993). In fact, in *Mitchell Humphrey*, the Eastern District specifically held that disclosure of some privileged communications does not waive privilege as to all such communications. *Id.* at 813. The Eastern District goes on to deny that a waiver exists of the work product immunity by disclosure of some documents in the pursuit of trial preparation. Contrary to the Relator's briefing of this case, the *Mitchell Humphrey* court held that **no** waiver of the work product immunity existed for other documents by voluntarily disclosing certain requested documents that were considered consistent with other discovery they wanted on the same issue. *Id.* The waiver was limited only to those documents

actually produced.

Relator misconstrues the holding of this case. In a footnote, the appellate court noted that the actual documents that had been previously produced in that same case were no longer protected by the work product immunity. In no way does this support Relator's contention that Mr. Loumiet can now be deposed. Instead, *Mitchell Humphrey* stands for the proposition that only Mr. Loumiet's report as produced in the Kansas case would no longer have any work product immunity in the Kansas case. Even if Mr. Loumiet's report no longer has any work product immunity in the Missouri case, this does not authorize Mr. Loumiet's deposition, not confer upon him that same lack of immunity. If in *Mitchell Humphrey* the other documents on the same issue were not subject to discovery, then Mr. Loumiet himself cannot be subject to discovery merely because his report may no longer enjoy the work product immunity.

Relator again distorts the holdings of the court in *State ex rel. Day v. Patterson*, 773 S.W.2d 224 (Mo. App. E.D. 1989). Relator suggests that somehow the court's holding that work product immunity or confidentiality in one case applies to a related case supports Relator's waiver theory. This case does not remotely imply that waiver of work product immunity or privilege can occur in one case by a partial disclosure in discovery in a related case. Just the opposite is true – this case promotes and upholds the policy of protecting information from disclosure. It is a far different thing to state that privileged matter in one case is privileged in another, as to state that privilege waived in one case is privileged waived in another.

F. <u>No evidence has been produced that suggests that Relator has been unduly prejudiced by Respondent's denial of Mr. Loumiet's deposition.</u>

In *State ex rel. Richardson v. Randall*, 660 S.W.2d 699 (Mo. banc 1983), this Court employed prohibition to bar a circuit court from compelling an accused in a forgery case to disclose to the prosecution the name of a handwriting expert retained by the accused, which expert the accused did not intend to use at trial. The opinion stated:

> This Court has denounced promiscuous and expansive use and abuse of prohibition to allow review of trial court error, particularly in circumstances other than those concerning the question of trial court jurisdiction. [Citations omitted]. But from time to time in peculiarly limited situations there are instances in which absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court's order. In such circumstances, the extemporaneous character of prohibition may be the remedy to be applied. *Id.* at 701.

In the instant case, Relator has made no suggestions and provided no evidence to believe that the Relator suffers ANY prejudice by the trial court's decision to not allow the deposition of Plaintiff's consulting expert let alone, irreparable harm. Like the prosecution in the R*andall* case, Relator need is not prejudiced by the inability to benefit from Plaintiff's paid expert, but instead, Relator is quite capable of hiring its own expert(s) to address issues it believes may be the subject of Mr. Loumiet's conclusions.

CONCLUSION

Respondent's adherence to the holdings and reasoning of this Court's precedents, *Tracy* and *Hamid*, can not be viewed as an abuse of discretion because the trial court's ruling was not clearly

against the logic of the circumstances before the court nor arbitrary nor so unreasonable as to shock the sense of justice or indicate a lack of careful considerations. Instead, this Court should not disturb Respondent's ruling because Respondent correctly sustained the Motion to Quash the deposition of Plaintiff's retained expert. Relator is not entitled to the mental impressions, conclusions and opinions of plaintiff's consulting expert. At best, Plaintiff may have waived the work product immunity as to Mr. Loumiet's report that was disclosed in a prior Kansas case, but under *Hamid* even that possible waiver would only mean Relator may have been entitled to contact Mr. Loumiet ex parte and possibly use Mr. Loumiet's report against Plaintiff at trial. Relator has failed to demonstrate the clear and unambiguous right to formal discovery or plaintiff's consulting expert, and consequently Realtor's Notice of Deposition which clearly called for Mr. Loumiet to provide all information whatsoever in his possession was properly quashed.

This Court has clearly announced that consulting expert's mental impressions, conclusions, and opinions are absolutely immune from discovery unless and until that expert testifies. In *Tracy*, this Court held that a party has a right to withdraw an expert as a testifying expert prior to that expert's deposition so that the expert cannot be compelled to testify for the adverse party. Provided the withdrawal occurs prior to the deposition, any documents provided to that expert retain the work product protection.

Relator erroneously assumes that the disclosure of an expert and opposing counsel's possession of some report authored by that expert completely waives the work product immunity. Missouri courts have explicitly held to the contrary.

Finally, no showing has been made to this Court or in the original hearing before Respondent

that the Relator is in any way prejudiced by not being allowed to invade Plaintiff's work product and depose plaintiff's consulting expert. Because the Relator has utterly failed to show any abuse of discretion by the Respondent or any prejudice to it by the Respondent's decisions, the writ requested should be denied.

Respectfully submitted:

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Certificate of Service and of Compliance with Rule 84.06(b) & (c) & Special Rule No. 1

The undersigned hereby certifies that on this 7th day of November, 2001, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06(b), and Special Rule No. 1 and that the brief contains 7,339 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____
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